Hairul Hisham bin Salim v Dato' Zainal Abidin bin Zin & Anor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO (MT-1) 44-01 OF 2001
SYED AHMAD HELMY JC
8 NOVEMBER 2002

Preventive Detention — *Detention order — Application for habeas corpus — Detention made under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Presence of words 'amongst others' in detention order — Whether detention order valid — Whether words 'amongst others' suggested that Minister had taken extraneous consideration in arriving at his subjective satisfaction of issuing detention order — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4*

Preventive Detention — *Detention order — Application for habeas corpus — Detention made under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Significant lag of time between applicant's prejudicial criminal activities and detention order — No explanation was given for delay — Whether there had been inordinate delay between detention order and criminal activities — Whether detention order was bad in law*

The applicant was detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Emergency Ordinance') pursuant to a detention order issued under s 4(1) thereof. This was the applicant's application for a writ of habeas corpus to be issued against the respondents and for the applicant to be released forthwith. The grounds advanced by the applicant in support of the application were: (a) the detention order was invalid by reason of the insertion and usage of the words 'di antara' (or 'amongst others') in the grounds of detention which, according to the applicant was tantamount to furnishing a part only and not all of the allegations of facts upon which the detention order was based as required by s 4(4)(b) of the Emergency Ordinance; and (b) the detention order was bad in law because of the significant lag of time between the prejudicial criminal activities of the applicant and the detention order. The last of the prejudicial criminal activities of the applicant was on 26 February 2000, whereas the detention order was only made on 8 November 2001.

Held, allowing the application:

(1) The presence of the words 'di antara' (or 'amongst others') in the grounds of detention did not affect the detention order. This was because the words 'amongst others' cannot and did not in any way suggest or establish that the Minister had taken extraneous consideration in arriving at his subjective satisfaction of issuing the detention order (see p 572B).

(2) The presence of the words 'di antara' in the context of the grounds supporting the detention order was to be interpreted as giving a wider and all encompassing meaning to the detenu's

diverse criminal activities similar to the interpretation given to the conjunction 'or' under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1965 ('the Act') by the Court of Appeal in *Abdul Rahman Maidin v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2000] 3 MLJ 108 (see p 572D–E).

(3) The case of *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* relied on by the Federal Counsel revolved round a detention under the Act. Section 6(1) thereof provided that whenever the Minister was satisfied that the person 'has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may ... direct that such person be detained for a period not exceeding two years'. By virtue of the words 'has been' in s 6(1), the Minister was empowered to take into consideration the past association of the detenu with any activity relating to or involving the trafficking in dangerous drugs. This fell within the ambit of the subjective satisfaction of the Minister for which the court cannot intrude (see pp 573I–574A–D); *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck*[1990] 1 MLJ 104 distinguished.

(4) In the instant case, the detention was made under the Emergency Ordinance, a statute which was different from the Act. In s 4(1) of the Emergency Ordinance, which contained the powers of detention, the words 'has been' were absent in s 4(1) of the Emergency Ordinance, unlike s 6(1) of the Act. The absence thereof was of extreme importance as it had the effect of excluding the past association of the detenu with criminal activities as falling exclusively within the subjective satisfaction of the Minister so as to exclude the court's inquiry. By virtue of this distinguishing feature, the court was justified in departing from the principle of stare decisis of *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104 (see pp 574F–575A)

(5) There had been inordinate delay between the detention order and the criminal activities of the detenu as contained in the allegations of fact. No explanation was given for the delay and it was now too late in the day for the Minister to furnish an explanation now. Since the respondent had failed to respond and place all the available evidence and explanation to the court, this had led the court to conclude that the subjective satisfaction of the Minister was not genuine and was colorable. Since preventive detention was a serious affront to personal liberty, the court had no discretion but to accede to the applicant's prayers and issue a writ of habeas corpus (see p 576B, E–F).

[Bahasa Malaysia summary

Pemohon telah ditahan di bawah Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan tersebut') menurut

satu perintah penahanan yang dikeluarkan di bawah s 4(1). Ini adalah permohonan pemohon untuk satu writ habeas corpus dikeluarkan terhadap responden-responden dan agar pemohon dibebaskan. Alasan-alasan yang dikemukakan oleh pemohon bagi menyokong permohonan tersebut adalah: (a) perintah penahanan tersebut adalah tidak sah oleh sebab kemasukan dan pemakaian perkataan 'di antara' (atau 'amongst others') dalam alasan-alasan penahanan tersebut yang mana, menurut pemohon adalah sama seperti mengemukakan hanya sebahagian dan bukan semua fakta-fakta pengataan di mana perintah penahanan tersebut didasari sebagaimana yang dikehendaki oleh s 4(4)(b) Ordinan tersebut; dan (b) perintah penahanan adalah salah di sisi undang-undang kerana terdapat sela waktu yang ketara antara kegiatan-kegiatan jenayah pemohon yang memudaratkan dan perintah penahanan. Kegiatan jenayah pemohon yang memudaratkan adalah pada 26 Februari 2000, manakala perintah penahanan hanya dibuat pada 8 November 2001.

Diputuskan, membenarkan permohonan tersebut:

(1) Kewujudan perkataan-perkataan 'di antara' (atau 'amongst others') dalam alasan-alasan penahanan tidak menjejaskan perintah penahanan tersebut. Ini adalah kerana perkataan-perkataan 'amongst others' tidak boleh dan tidak dalam apa cara mencadangkan atau membuktikan bahawa Menteri telah memberi pertimbangan yang tidak berkaitan apabila beliau secara subjektif berpuas hati dengan mengeluarkan perintah penahanan tersebut (lihat ms 572B).

(2) Kewujudan perkataan-perkataan 'di antara' dalam konteks alasan-alasan yang menyokong perintah penahanan tersebut harus ditafsirkan sebagai memberi maksud yang lebih luas dan merangkumi kegiatan-kegiatan jenayah detenu yang pelbagai yang sama dengan tafsiran yang diberikan kepada penghubung 'or' di bawah s 6(1) Akta Dadah (Langkah-Langkah Pencegahan Khas) 1985 ('Akta tersebut') oleh Mahkamah Rayuan dalam *Abdul Rahman Maidin v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2000] 3 MLJ 108 (lihat ms 572D–E).

(3) Kes *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* yang Mahkamah Persekutuan bergantung kepada adalah berkisarkan satu penahanan di bawah Akta tersebut. Seksyen 6(1) memperuntukkan bahawa apabila Menteri berpuas hati bahawa seseorang itu 'has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may ... direct that such person be detained for a period not exceeding two years'. Menurut perkataan-perkataan 'has been' dalam s 6(1), Menteri diberikan kuasa untuk mengambilkira penglibatan masa lalu detinu dengan apa-apa kegiatan berkaitan dengan atau melibatkan pengedaran dadah merbahaya. Ini

terangkum dalam lingkungan kepuasan subjektif Menteri yang tidak boleh diganggu oleh mahkamah (lihat ms 573I–574A–D); *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104 dibeza.

(4) Dalam kes semasa, penahanan tersebut dibuat di bawah Ordinan tersebut, satu statut yang berbeza dengan Akta tersebut. Dalam s 4(1) Ordinan tersebut, yang mengandungi kuasa-kuasa tahanan, perkataan-perkataan 'has been' tiada dalam s 4(1) Ordinan tersebut, tidak seperti s 6(1) Akta tersebut. Ketiadaan tersebut amat penting kerana ia mempunyai kesan mengecualikan penglibatan masa lalu detinu dengan kegiatan-kegiatan jenayah yang sebagai terangkum dalam kepuasan subjektif Menteri untuk mengecualikan siasatan mahkamah. Menurut ciri yang berbeza, mahkamah mempunyai justifikasi yang baik untuk tidak mengikut prinsip stare decisis dalam kes *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104 (lihat ms 574F–575A)

(5) Terdapat kelewatan yang melampau antara perintah penahanan dan kegiatan-kegiatan detinu sebagaimana yang terkandung dalam pengataan-pengataan berfakta. Tiada penjelasan diberikan kerana kelewatan tersebut dan sekarang ia amat lewat untuk Menteri mengemukakan satu penjelasan. Memandangkan responden gagal untuk menjawab dan mengemukakan kesemua keterangan dan penjelasan yang ada ke hadapan mahkamah, ini menyebabkan mahkamah membuat kesimpulan bahawa kepuasan subjektif Menteri tidak benar dan memprasangkakan. Memandangkan perintah penahanan adalah satu penghinaan yang serius kepada kebebasan peribadi, mahkamah tiada budi bicara tetapi untuk bersetuju dengan permohonan-permohonan pemohon dan mengeluarkan satu writ habeas corpus (lihat ms 576B, E–F).]

[*Editorial Note:* The applicant filed a notice of appeal to the Federal Court on 11 November 2002.]

Notes

For cases on application for habeas corpus, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1199–1214.

Cases referred to

Abdul Rahman bin Haji Maidin v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2000] 3 MLJ 108 (refd)

Malaysia Bar v Tan Sri Dato Abdul Hamid bin Omar [1989] 2 MLJ 281 (refd)

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Chua Teck [1990] 1 MLJ 104 (distd)

A *SK Serajul v State of West Benjal* AIR 1975 SC 1517 (refd)
Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638 (refd)
Yong Pik Sing v The Pengarah, Pusat Pemulihan Akhlak & Anor [2000] 5 MLJ 1 (refd)

B

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(3)(c), 4(1), (4)(b), 5
C Federal Constitution art 151

Gobind Singh Deo (*Zamri Idrus* with him) (*Karpal Singh & Co*) for the applicant.
Abdul Rani (Senior Federal Counsel, Attorney General's Chambers) for the respondent

D **Syed Ahmad Helmy JC:** The applicant herein was detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Emergency Ordinance') pursuant to a detention order dated 8 November 2001 issued under s 4(1) of the Emergency Ordinance. By notice of motion in encl 2, the applicant filed this application for a writ of habeas corpus to be issued against the respondents and for the applicant to be released
E forthwith.

The applicant advanced two grounds in support of the application as follows:

(1) The detention order is invalid by reason of the paraphrasing by the insertion and usage of the words 'di antara' or 'amongst others' in the
F grounds of detention which usage of words tantamounts to furnishing a part only and not all of the allegations of facts upon which the detention order is based as required by s 4(4)(b) of the Emergency Ordinance.

(2) The detention order is bad in law because of the significant lag of time
G between the prejudicial criminal activities of the applicant and the detention order.

Coming to the first ground aforesaid, it is the applicant's submission that by virtue of s 4(4)(b) of the Emergency Ordinance, the Minister must furnish the detenu-applicant with those allegations of facts upon which the
H detention order is based and not only part of the allegations involved. The furnishing of all the allegations of facts is to give effect to the constitutional right of the detenu under art 151 of the Federal Constitution and s 5 of the Emergency Ordinance to make representations, the failure of which would prejudice the detenu. The presence of the words 'di antara', it is submitted, establishes that the detaining authority has chosen only to inform the
I detenu some and not all of the allegations of facts and as such runs afoul of s 4 of the Emergency Ordinance which provides that the facts upon which the detention order is based must be communicated to the detenu. The

applicant also advanced the argument that there was wrongful subjective consideration by the Minister as he was influenced not by the alasan prepared by Che Murad Sayang bin Ramjan but rather the laporan penyiasatan or inquiry report prepared by ACP Abdul Rahim bin Haji Hanafi in coming to his subjective satisfaction of issuing the detention order. A

On the presence of the words 'di antara' in the grounds of detention, it is my considered view that it does not affect the detention order. This is because the words, the English equivalent is 'amongst others' cannot and does not in any way suggest or establishes that the Minister has taken extraneous consideration in arriving at his subjective satisfaction of issuing the detention order. In point of fact, the evidence is to the contrary as the Minister in his affidavit affirmed on the 22 April 2002 in para 7 thereof specifically affirmed that he based his subjective satisfaction on the grounds which he had directed the officer Che Murad Sayang bin Ramjan to prepare. This piece of evidence clearly establishes that the Minister far from taking into account extraneous consideration specifically directed and focused his mind to the six grounds appearing therein. B C D

The presence of the words 'di antara' to my mind in the context of the grounds supporting the detention order herein is to be interpreted as giving a wider and all encompassing meaning to the detenu's diverse criminal activities similar to the interpretation given to the conjunction 'or' under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Drugs Act') by the Court of Appeal in *Abdul Rahman bin Haji Maidin v Timbalan Menteri Dalam Negeri, Malaysia & Ors*[2000] 3 MLJ 108. E

I must also emphasize that the six grounds upon which the Minister based the detention order does not in any way prejudice and/or curtail the applicant's constitutional right and the right conferred under s 5 of the Emergency Ordinance to make representation. F

On the detenu's counsel argument that the Minister was influenced by the inquiry report prepared by ACP Abdul Rahim bin Haji Hanafi and not the alasan prepared by Che Murad Sayang bin Ramjan in coming to his subjective satisfaction of issuing the detention order is to my mind flawed and laced with confusion. This is because the *laporan penyiasatan* or inquiry report is a report which is required to be prepared under the provisions of s 3(3)(c) of the Emergency Ordinance for the purpose of the initial detention of not exceeding 60 days under s 3 thereof. The report itself relates to the investigation of the criminal activities of the detenu and is a requirement for the detaining authority to obtain to enable the detenu to be lawfully detained above the 30 day period in the initial detention period of 60 days without a detention order. G H

As I have found earlier that the Minister specifically directed his subjective satisfaction on the six grounds as prepared by Che Murad Sayang bin Ramjan as directed, the contention that the Minister was influenced by the *laporan penyiasatan* and not the grounds of detention must fail and I accordingly rule against the detenu's first ground of complaint. I

A The second ground challenging the legality of the detention as formulated by learned counsel for the applicant was the allegation of facts which constituted the basis of the applicant's detention were stale and too remote in point of time in relation to the date of the detention order and in the absence of a satisfactory explanation for the delay, the subjective satisfaction of the Minister is not genuine or colorable and relies on the case B of *Yong Pik Sing v The Pengarah, Pusat Pemulihan Akhlak & Anor* [2000] 5 MLJ 1.

The respondent in the face of such challenge contended that the issue of staleness and remoteness goes to the question of sufficiency or relevancy of the facts an enquiry which the court is prohibited from embarking upon C as it falls within the domain of the subjective satisfaction of the Minister and relies on the Supreme Court decision of *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104. By reason thereof and based on the principle of stare decisis, learned federal counsel submits that this court is bound by the Supreme Court's decision that staleness or remoteness of the allegations of fact goes to the question of sufficiency or D relevancy of the facts and hence is beyond the ambit of the court's powers to inquire.

The principle of stare decisis encapsulate the doctrine that a ratio decidendi of a superior court must be followed and is binding on the court below. Over the years, certain guidelines have been established on the E application of the principle and amongst them is whether based upon the factual matrix of the case, the point or question for determination is sufficiently and closely identifiable with the ratio decidendi of the binding precedent.

Hence, if the factual matrix is not sufficiently and closely identifiable and is distinguishable then it may fall outside the purview of the principle F and it is permissible for the lower court to discount its binding effect.

In the instant case, that was what was precisely urged by learned counsel of the applicant on me when he strenuously argued that whether or not the principle of stare decisis is applicable is pivoted on a determination of the objective of the particular detention statute — in that of ascertaining G whether its objective permits consideration of past association of the impugned criminal activities — if it does as under the provisions of the Drugs Act then it clearly relates to the question of sufficiency or relevancy of facts within the Minister's ambit and hence not questionable but not otherwise.

H The contention of learned counsel of the importance to consider and evaluate the object of the particular statute is not without force and hence it behoves upon me to ascertain by adopting an analytical approach of the basis of the Supreme Court decision in *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104 ('Chua Teck') and its binding nature on this court.

I A starting point in the analysis is that *Chua Teck*'s case revolves round a detention under the Drugs Act. The power to order detention is found under s 6(1) of the Drugs Act and a careful perusal of same would reveal

the presence of the word 'has been' and hence it cannot be disputed that the Minister is empowered to take into consideration the past association of the detenu with any activity relating to or involving in the trafficking in dangerous drugs.

Section 6(1) is reproduced:

> Power to order detention and restriction of persons.
>
> (1) Whenever the Minister, after considering –
>
> (a) the complete report of investigation submitted under subsection (3) of section 3; and
>
> (b) the report of the inquiry officer submitted under subsection (4) of section 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

By reason of the express empowerment to take into consideration the detenu's past association, it invariably falls within the ambit of the subjective satisfaction of the Minister for which the court cannot intrude.

The Supreme Court in arriving at its ruling adopted the rationale as laid out by the judge of the court of first instance. Justice LC Vohrah in providing the rationale stated at p 118 para I and p 119 paras A—B:

> In my view, the question of staleness or remoteness forming the first ground of challenge goes to the question of sufficiency or relevancy of the facts, an enquiry upon which the court cannot embark as it is based on *the subjective satisfaction of the Minister who is making the first order of detention* in the interest of public order under s 5(1) *of the Act, can take into account the applicant's past association* 'with any activity in relation to or involving the trafficking in dangerous drugs' (see *Ee Kim Huan v Inspector General of Police & Ors in Seremban Criminal Application No* 44/(54)–59–88). (Emphasis added.)

Turning to the factual matrix herein, the detention is made under the provisions of the Emergency Ordinance — a statute which is different from the Drugs Act. The powers of detention under the Emergency Ordinance is found in s 4(1) which provides:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order ('a detention order') directing that that person be detained for any period not exceeding two years.

Upon reading the wording thereof, a notable striking feature is the absence of the word 'has been' as appears in the Drugs Act. The absence thereof is of extreme importance as it has the effect of excluding the past association of the detenu with criminal activities as falling exclusively within the subjective satisfaction of the Minister so as to exclude the court's inquiry.

A Hence by reason thereof, a distinguishing feature arises resulting in the court being justified in departing from the principle of stare decisis of *Chua Teck*'s case. I can safely say that *Chua Teck*'s case in establishing that the question of staleness or remoteness goes to the question of sufficiency or relevancy of the facts and hence falling within the subjective satisfaction of the Minister is only confined to cases of detention made in pursuance to the B Drugs Act and cannot be applicable to detentions made under any other statutes. In short, it is my considered view that the court is empowered to examine the relevant statute and determine its objective and scope to ascertain whether it falls within the subjective satisfaction of the Minister to preclude the court's adjudication.

C Justice LC Vohrah in *Chua Teck* did in fact state that the court is not precluded from examining whether the detention falls within the scope of the law under consideration. At p 119 para E–H, he stated as follows:

> Although it is clear on the authorities that the court is precluded from adjudicating on the sufficiency of the satisfaction of the Minister *it can however* D *examine whether the detention falls within the scope of the law under consideration.* The Minister purported to act pursuant to the powers conferred under s 6(5)(a) which relates to his subjective satisfaction being based on the complete report of investigation submitted under sub-s (3) of s 3 and on the report of the inquiry officer submitted under sub-s (4) of s 5 and when the Minister considered the report of the advisory board which contained a E specific recommendation for the further detention of the applicant, he had in fact taken into account extraneous material which the law did not contemplate he should consider and he had, in my view, purported to exercise powers beyond the ambit of s 6(1). As there was no strict compliance with the provisions of the law affecting the personal liberty, it was my judgment that the applicant was entitled to be granted his application and I accordingly F ordered that the writ of habeas corpus be issued for him to be set free. (Emphasis added.)

The scope of the law alluded to by his Lordship would to my mind also include the objective and since the objective of the Emergency Ordinance excludes consideration of past association of the detenu criminal activities G as falling exclusively within the subjective satisfaction of the Minister the court is not precluded from questioning the staleness or remoteness of the detenu's criminal activities in relation to the detention order.

By taking into account extraneous material which the law did not contemplate he should consider he had exercised powers beyond the ambit of s 4 of the Emergency Ordinance.

H

I must also stress that the point of delay though not expressly worded as such was raised by the detenu in para 6(i) of his affidavit affirmed on 22 December 2001. The thrust of the delay complaint was that the last of the prejudicial criminal activities of the applicant was on the 26 February 2000 as appear whereas the detention order was only made on 8 November I 2001 — a lapse of time of some one year and nine months and there was an absence of any offending act during the time period which places an obligation on the respondent to explain the delay.

The respondent ought to have been alerted by the averment raised in para 6(i) thereof and furnished explanation for delay, which unfortunately he has failed to do.

The requirement that any material delay has to be explained is a readily recognizable principle in both criminal and civil law — *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638; *Malaysia Bar v Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281.

It is now too late in the day for the Minister to be proffered to furnish an explanation for the delay. As was stated by Bagwati J in *SK Serajul v State of West Benjal* AIR 1975 SC 1517 at p 1518:

> Mr Chatterjee learned counsel appearing on behalf of the State of Bengal, contended that the State was not expected to render any explanation in regard to the delay in making the order for detention and arresting the petitioner because no such complaint was made in the petition. But this is hardly an argument which can avail the State when it is called upon to answer a rule issued on a petition for a writ of habeas corpus. It is the obligation of the State of the detaining authority in making its return to the rule in such a case to place all the relevant facts before the Court and if there is any delay in making the order for detention or in arresting the detenu which is prima facie unreasonable, the State must give reasons explaining the delay. (Emphasis added.)

As I had earlier found that the detenu had alluded in para 6(i) on the point of delay though not expressly worded it becomes all the more vital for the respondent to respond and place all the available evidence and explanations to the court, the failure of which would invariably result in the court to conclude that the subjective satisfaction of the Minister is not genuine and is colorable.

In the circumstances, I find that there has been inordinate delay between the detention order and the criminal activities of the detenu as contained in the allegations of fact which makes the first respondent's subjective satisfaction not genuine or colorable and by reason thereof as preventive detention is a serious affront to personal liberty the court has no discretion but to accede to the applicant's prayers and I accordingly order that a writ of habeas corpus be issued to him to be set free.

Application allowed.

Reported by Lim Lee Na

End of Volume 5